IN THE

Supreme Court of the United States

October Term, 1942. No. 450

ROBERT L. DOUGLAS, ALBERT R. GUN, DECKER, EARL KALKBRENNER, CARROL CHRISTOPHER, VICTOR SWANSON, NICHOLAS KODA, CHARLES SEDERS, ROBERT LAMBORN and ROBERT MURDOCK, JR.,

Petitioners

vs.

CITY OF JEANNETTE (Pennsylvania), a municipal corporation, and JOHN M. O'CONNELL, individually and as Mayor of City of Jeannette (Pennsylvania),

Respondents

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF

FRED B. TRESCHER,

KUNKLE, TRESCHER & SNYDER,

Attorneys for Respondents

[illegible] Gas Coal Building,

Greensburg, Pa.

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CITATIONS

Cases:

COUNTER-STATEMENT OF THE CASE

This action was brought in equity in the District Court of the United States for the Western District of Pennsylvania to restrain the City of Jeannette and its Mayor, John M. O'Connell, from enforcing one of its ordinances.

The ordinance requires persons who canvass for and sell merchandise of any kind from house to house to obtain a license to transact such business.

The District Court granted an injunction. The Circuit Court reversed the District Court. In an opinion by Judge Maris, and concurred in by Judges Biggs and Goodrich, a majority of the Court held that the District Court had jurisdiction of the case, and that on the authority of Bowden v. City of Fort Smith (Arkansas 1942), 62 S. Ct. 1231, 316 U. S. 584, 86 L. Ed. 1691, the ordinance was constitutional.

Judge Jones wrote a dissenting opinion on the question of jurisdiction, taking the position that the District Court lacked jurisdiction in the absence of any averment of fact from which it could be inferred that the complainants were denied due process of law.

The jurisdiction of the District Court to restrain the City of Jeannette from enforcing its ordinance was claimed under the Civil Rights Act of 1871, now Section 1979, Revised Statutes, 8 USCA, Section 43,[1] which gives to in-

[1] Section 1979 Revised Statutes is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivа-

dividuals a right of action at law or in equity against any person, who, under color of any ordinance, deprives such person of rights, privileges or immunities secured by the Constitution, and under Section 2414 of the Judicial Code, 28 USCA, Section 4114, which confers upon district courts jurisdiction to entertain actions brought in such case.[2]

The complaint was in most general terms. It contained no specific averments. It set forth that on April 3, 1939, the defendants caused "the arrest of plaintiffs and other persons known as Jehovah's Witnesses, and thereafter maliciously prosecuted plaintiff and others for an alleged violation of a municipal ordinance. * * *" (R. 7) It averred that "plaintiffs and others of Jehovah's Witnesses have been arrested and prosecuted for exercising the right of free press, free speech and freedom of worship of Almighty God * * *" (R. 8); that plaintiffs had been "falsely arrested," and "compelled to undergo a mock trial, where they were denied the rights of freedom of speech, of press and of worship." (R. 9); that "plaintiffs have to undergo

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tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceedings for redress."

[2] Section 24 (14) of the Judicial Code is as follows:

"The district courts shall have original jurisdiction as follows:

* * * * * * *

"Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

great burden of expense to appeal from their aforesaid wrongful convictions to higher courts; that they are now unable to continue to appeal and provide counsel for future cases threatened by the defendants to be brought against the plaintiffs when exercising their constitutional rights in the manner hereinbefore described" (R. 9).

The answer of Mayor O'Connell and of the City of Jeannette denies that the plaintiffs, or any of them, or any of their cult, had ever been falsely arrested, maliciously prosecuted, or subjected to a mock trial, and asserted on the contrary that they were given a full and fair trial, and convictions passed upon by the Courts of Quarter Sessions of Westmoreland County, the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania, and the Supreme Court of the United States (R. 17 and 18).

The testimony shows that about the middle of March of 1939, after the city officials had made an effort to persuade Jehovah's Witnesses to conform with the licensing requirements of Ordinance No. 60, a few of their number were arrested (R. 28, 29, 59). These cases were appealed to the Court of Quarter Sessions of Westmoreland County. While the appeals were pending, Mr. Hessler, zone servant for Jehovah's Witnesses, made an effort to induce the city officials to withdraw the prosecution, and upon their refusal to do so, he informed the city authorities that he would be back, and come back with more salesmen than the city police force could cope with (R. 100, 129, 130, 192). His defiant threat was made good. On April 2nd, 1939, more than a hundred canvassers appeared in town (R. 130). Their incessant hammering on doors of the homes of the residents resulted in a deluge of 'phone calls at the police station (R. 100, 101, 130, 131, 132). The demands for relief from the annoyances were so great that the facilities of the Fire Department had to be made available and some of the complaints received there (R. 101,

130). In many instances, people were called upon two, three and four times by different groups (R. 10).

The complaints disclose that in a number of instances all pretense of religious endeavor was being abandoned by the canvassers, and that they were simply peddling books from door to door in the manner ordinary peddlers employ (R. 100, 101). In these cases, arrests were made. Charges were filed against twenty-one persons so engaged, and after a full hearing, eighteen of the defendants were convicted (R. 101, 102). There is no suggestion anywhere in the record that they were not afforded a full and fair hearing. None of the defendants even took the stand to deny the testimony offered by the Commonwealth's witnesses (Stewart et al. v. City of Jeannette, No. 722 October Term, 1939 in the Supreme Court of the United States, R. 102).

These cases were appealed to the several Courts of Pennsylvania, and finally reached this Court, where a certiorari was denied (Stewart et al. v. Commonwealth, No. 722 October Term, 1939, 309 U. S. 674 R. 63, 64). After this Court denied a certiorari, the persons arrested, at their own request, were committed to jail in lieu of payment of fine (R. 102). A habeas corpus proceeding was instituted, and the matter was again taken to the Superior Court of Pennsylvania. Ferree vs. Douglas, 145 Pa. Super. 447, 21 A. 2nd 472.

In February of 1940, members of the cult again engaged in selling from door to door without a license. More arrests were made (R. 103). They were each afforded a full hearing and stenographic notes of testimony were taken at the trial (Defendant's Exhibit C, R. 105). Appeals were taken to the Court of Common Pleas of Westmoreland County, Pennsylvania, and at the request of the *defendants*, the decision in the appeal was held in abeyance pend-

ing a decision in other cases then before the appellate courts (R. 66, 67). These cases ultimately reached the Superior Court of Pennsylvania, and are now before this Court at Nos. 480 to 487, both inclusive, October Term, 1942.

On the occasion of these eight arrests, there were more than a hundred members of Jehovah's Witnesses engaging in unreasonable and unnecessary and annoying solicitation. Here again, only those who were engaged in actual selling from door to door were arrested and charged with violation of the ordinance.

The complaint charged that the petitioners had been put to great expense defending themselves in the various charges brought under the ordinance. The testimony failed to show a single expenditure by any of the complainants. It affirmatively showed, on the contrary, that all legal expenses had been paid by a corporation known as Kingdom Service Company.

Mr. Hessler testified that Kingdom Service Incorporated was maintained by voluntary contributions of a dollar from each of the members (R. 82). It ultimately developed that Kingdom Service Incorporated derived its income largely from payments made by the several companies through which the Watch Tower Bible and Tract Society sold its books (R. 106, 107, 108).

There was some pretense that Kingdom Service Company maintained a school, (R. 82), but when the books and records were produced, they showed a comparatively small part of the income of the corporation devoted to school work (R. 109, 110, 111 and 112).

The testimony in chief showed that full time ministers, like Mr. Hessler, obtained books from the Watch Tower Bible and Tract Society for the sum of five cents and sold them for twenty-five cents (R. 75, 76). The testimony in

chief further showed that the several companies of Jehovah's Witnesses purchased books from the Watch Tower Bible and Tract Society for twenty cents and sold them to individual members at the same price (R. 75).

Counsel for the respondents insisted upon the production of records. The petitioners were reluctant to produce records (R. 82, 83, 84). Finally the records for the Central Unit, Pittsburgh Company of Jehovah's Witnesses, were produced. They showed the purchase of literature and books from the Watch Tower Bible and Tract Society, 117 Adams Street, Brooklyn, New York, and World Syndicate Publishing Company, Cleveland, Ohio. Typical examples of what the books showed from the purchases and sale of literature during the year 1940 were for the month of

August $284.84 received and $117.64 paid out
September $474.08 received and $275.85 paid out
October $479.29 received and $287.50 paid out
(R. 117)

Mr. Stewart, who produced the books, insisted that the monthly balance was carried forward each month so that the books did not show actual income and expenditures. They did show substantial payments each month for such items as rent, telephone service and sales expense (R. 118, 119, 120, 121). Mr. Stewart finally attempted to explain the wide difference between receipts and expenditures by saying that the company was indebted to the Watch Tower Bible and Tract Society in the amount of $1,300 for books. The item, however, was not shown on his books (R. 125).

The numerous different companies through and under which Jehovah's Witnesses operated made it impossible to trace the source of their funds or the purpose for which expenditures were made. Kingdom Service paid out large sums of money each month for what purported to be legal

expenses (R. 108 to 111). Of the sums alleged to have been paid out by virtue of litigation involving ordinance No. 60, of the City of Jeannette, at least $400 was paid out in connection with the equity suit presently before the Court (R. 111).

Only one of the plaintiffs testified. It was not shown that he, or any of the plaintiffs, were in any way associated with or made contributions to Kingdom Service or any of the numerous companies which comprise Jehovah's Witnesses.

There was thus no suggestion anywhere that the small daily or weekly fee or tax imposed by ordinance No. 60 for the privilege of selling books from door to door in the City of Jeannette would be a burden on these plaintiffs, or any of their associates, or on any of their companies. On the contrary, it affirmatively appeared that there were ample funds available, out of which the tax might have been paid (R. 108, 109, 110, 117, 118, 119, 120, 127).

An effort was made to show that a company of Jehovah's Witnesses at one time existed in the City of Jeannette, and that it was compelled to disband because of the arrests (R. 40, 41). The testimony about a Jeannette company was purely hearsay (R. 56). Again when records were insisted upon, it became apparent that no Jeannette Company ever existed (R. 71, 72), and if such company ever did exist, it was prior to any of the arrests concerning which testimony was given at the trial (R. 114, 115).

The record further shows that members of Jehovah's Witnesses are perfectly free to sell their books and other publications on the public streets (R. 97), and that when they did nothing more than to go from door to door presenting a card soliciting contributions, they were not molested (R. 93). It was only where the individuals were

going from door to door, into the houses, and selling that prosecutions were instituted.

The records in the case of Stewart et al. v. City of Jeannette, and the records now before this Court in Murdock et al. v. City of Jeannette show that the transactions there involved can be branded nothing more nor less than commercial. Both these records were offered as Exhibits in this case (Exhibit C, R: 103, 101, 102, 105—Exhibit A, R. 63, 64).

ARGUMENT

There is involved in this case, not only the constitutionality of Ordinance No. 60, but also the very important question whether the Federal Courts have jurisdiction under Section 2414 of the Judicial Code, 28 USCA, Section 41 (14), in the absence of any averment or proof that the petitioners were denied due process of law.

The contention of counsel for the petitioners that the respondents are not at liberty to press the latter question because a majority of the Circuit Court held that the District Court had jurisdiction, is very effectively disposed of in one of the cases cited in petitioners' brief.

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."
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> *Langnes v. Green*, 282 U. S. 531, 538, 539, 75 L. Ed. 520.

Argument

THE DISTRICT COURT LACKED JURISDICTION

Section 2414 of the Judicial Code, 28 USCA, Section 41 (14), gives District Courts original jurisdiction "of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any State, or any right, privilege or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States:".

The Civil Rights Act of 1871, now Section 1979 Revised Statutes, 8 USCA, Section 43, confers a right of action at law or in equity upon persons who have been deprived "of any right, privilege or immunity secured by the Constitution and laws", under color of any ordinance, law or statute.

Paragraph one of the complaint avers that "Jurisdiction of this suit is based upon existence of a 'federal question' irrespective of the amount of money involved, in that this action arises under the Constitution and laws of the United States and involves purely and solely 'civil rights' under and by virtue of the Civil Rights Act of 1871 and Section 24 (14) of the Judicial Code otherwise known as 28 U. S. C. A. 41 (14), which confers jurisdiction upon United States District Courts to entertain suits for injunction to redress the deprivation of 'civil rights' by persons acting under color of ordinance, law or statute of a state." (R. 3)

Paragraph 14 of the complaint avers that the "conduct and threatened conduct of the defendants against plaintiffs and other Jehovah's witnesses constitute viola-

tion of plaintiffs' civil rights contrary to Federal statutes, 18 U. S. C. A., sections 51 and 52, and also violation of the 'Civil Rights Act of 1871' in that the defendants concerned under color of law and in a conspiracy to deprive Jehovah's Witnesses of their constitutional rights of freedom of speech, of press, of assembly, and freedom to worship Almighty God, by unlawfully arresting and falsely charging and wrongfully threatening to arrest and charge the said Jehovah's witnesses with a violation of the above described ordinance of aforesaid Pennsylvania municipality." (R. 10)

These sections are portions of the Criminal Code (R. S. Sec. 5508; Mar. 4, 1909, C. 321, Sec. 19, 35 Stat. 1092, and R. S. Sec. 5510; Mar. 4, 1909, C. 321, Sec. 20, 35 Stat. 1092). The former makes it a criminal offense, punishable by heavy fine and imprisonment, for two or more persons to conspire to oppress or intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution, or for two or more persons to go in disguise upon the highways with intent to prevent or hinder the free exercise or enjoyment of any rights secured by the Constitution. The latter makes it a criminal offense for anyone under color of any law or ordinance to deprive any inhabitant of any rights secured by the constitution or to subject any inhabitant to different pains or punishments by reason of alienage or by reason of color or race than are prescribed for the punishment of other citizens.

The averments contained in Paragraph 14 of the complaint cannot possibly be construed as conferring upon Federal Courts any jurisdiction in a civil action such as the one now before the Court.

The pleadings contain numerous conclusions to the effect that the defendants "did unlawfully cause the arrest of the plaintiffs" and "thereafter maliciously prosecuted

plaintiffs", and "that after being falsely arrested they have been compelled to undergo a mock trial where they were denied rights of freedom of speech, of press and of worship by the defendants."

The complaint avers that the plaintiffs "have to undergo a great burden of expense to appeal from their said wrongful convictions to higher courts," and "that they are now unable to continue to appeal and to provide counsel for future cases threatened by the defendants * * *" (R. 7 and 9)

There is not a single averment of fact anywhere in the bill of complaint which would justify an inference that the petitioners, or any of them, were denied due process. There is no suggestion that any of their appeals to higher tribunals were sustained. The complaint itself shows an ordinance entirely regular on its face. It is the common type of peddlers' ordinance requiring registration and license of all who sell books and merchandise from house to house.

There is no intimation of discrimination or of absolute prohibition of peddling or canvassing or of censorship, or of oppressive fee.

The bill of complaint shows that the petitioners had full and free access to the courts and ample opportunity to resort to the ordinary processes of law to correct any injustice, procedural or otherwise.

An examination of the several averments of the petitioners' complaint demonstrates that they were attempting to bring the action within the decision of this Court in *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. Ed. 1423, and that lacking facts upon which their complaint might be based, averred conclusions instead.

The majority opinions of the Supreme Court in the

Hague case hold that jurisdiction to entertain a suit to enjoin the enforcement of a municipal ordinance under color of which individual plaintiffs have been denied the right to hold lawful meetings is conferred upon the Federal District Court by the provisions of Section 24 (14) of the Judicial Code, 28 U. S. C. A. Sec. 41 (14), only under certain circumstances.

The opinion of Mr. Justice Roberts, which is concurred in on this point by a majority of the members who took part in the decision, says:

> "The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgment by Section 1 of the Fourteenth Amendment and whether Rev. Stat. Sec. 1979 and Sec. 24 (14) of the Judicial Code 28 U. S. C. A. Sec. 41 (14) afford redress in a federal court for such abridgment. * * * Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation, and the benefits, advantages and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities, had this single end and aim. The District Court had jurisdiction under Sec. 24 (14)."
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> (L. Ed. pages 1435 and 1436, U. S. pages 512 and 513).

The opinion of Mr. Justice Roberts, concurred in by Mr. Justice Black, and the opinion of Mr. Justice Stone, concurred in, in part, by Mr. Chief Justice Hughes, make it clear that the jurisdiction of the District Court was sus-

tained only because national legislation, whose constitutionality had been sustained by the Supreme Court, was the subject with which the municipality, under the guise of enforcing its ordinance, was attempting to interfere. Mr. Justice Stone, now the Chief Justice, in a footnote to his opinion says:

> "The privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws. Slaughter-House Cases, 16 Wall. 36, 79, 21 L. Ed. 394, 409, see Stweinbug v. New Jersey, 211 U. S. 78, 97, 98, 53 L. Ed. 97, 105, 106, 29 S. Ct. 14.
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> That limitation upon the operation of the privileges and immunities clause has not been relaxed by any later decisions of this Court. . . . Upon that ground appeals to this Court to extend the clause beyond the limitation have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause. . . .
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> The reason for this narrow construction of the clause and the consistently exhibited reluctance of this Court to enlarge its scope has been well understood since the decision of the Slaughter-House Cases. If its restraint upon state action were to be extended more than is needful to protect relationships between the citizen and the national government, and if it were to be deemed to extend to those fundamental rights of person and property attached to citizenship by the common law and enactments of the states when the

Amendment was adopted, such as were described in Corfield v. Coryell, supra, it would enlarge Congressional and judicial control of the state action and multiply restrictions upon it whose nature, though difficult to anticipate with precision, would be of sufficient gravity to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the Slaughter-House Cases, with the decision against enlargement."

In the case at bar there is no pretense in either the pleadings or the proofs that the petitioners or any members of Jehovah's Witnesses were selling or distributing literature which in any manner discussed the relationship of citizens of the United States to the national government.

THE JURISDICTION OF FEDERAL COURTS ATTACHES ONLY WHERE THERE IS A TORTIOUS INVASION OF RIGHTS UNDER COLOR OF AN ORDINANCE

The opinion of Mr. Justice Roberts continues by pointing out that only natural persons are within the protection of Section 1 of the fourteenth amendment, and by reciting the numerous instances in which citizens of the United States were denied, under the guise of regulation, fundamental rights guaranteed them under the fourteenth amendment.

An ordinance which placed unlimited discretion in the Director of Public Safety of Jersey City to refuse permits to hold public meetings was held to be void on its face. It was the city's duty to prevent riots. The court said uncontrolled official suppression of the privilege of assem-

blage could not be made a substitute for the city's duty to maintain law and order. The instances of unreasonable searches, unlawful arrests and denials of public hearings and trials for supposed violations of city ordinances were numerous. The citizens were frequently picked up bodily and carried by the police beyond the city limits.

In substance, the plaintiffs in that case were deprived of the ordinary processes of law to either assert or to test their rights. On this latter point, the Circuit Court of the United States for the Third Circuit, in its decision of the case, very aptly said:

> "The appellants contend that the appellees have a full and adequate remedy at law and that therefore the causes of action set up in the bill of complaint are not cognizable in equity. In our opinion this contention cannot be sustained, the record clearly shows a shocking and constant disregard of the basic civil rights of the appellees by the appellants. These acts were torts and their threatened continuance is sufficient ground for the equitable relief sought and granted."

(101 Federal 2d, pages 790 and 791).

Judge Jones, of the Circuit Court, in his dissent from the reasoning of the majority of the Court in this case, makes the following significant statement:

> "As I read the opinion of Justice Stone in the Hague case, it seems implicit that a showing of a want of due process is essential to an invocation of the jurisdiction under Sec. 24 (14) of an action under R. S. Sec. 1979 for the redress of the deprivation of a right secured by the due process clause of the Fourteenth Amendment. The bill of complaint in the Hague case, whereby the jurisdiction was to be adjudged, fairly

bristled with allegations of fact showing an arbitrary, discriminatory and even violent deprivation of the complainants' freedom of speech, press and assembly, all done by municipal officers of Jersey City under color of enforcing a city ordinance. Certainly, Justice Stone's opinion in the Hague case provides no implication that all that is necessary to jurisdiction under Sec. 24 (14) to redress an alleged deprivation of liberty is an allegation that the defendants are acting contrary to the Fourteenth Amendment. If that were so, then the case involving a local ordinance or state statute that could not be taken directly to a District Court for attempted invalidation would, indeed, be difficult to imagine, for the security of the due process clause extends also to life and property. The necessary consequence would be an unwarranted extension of federal jurisdiction over local matters. Yet, a 'serious apprehension for the rightful independence of local government' was a reason ascribed by Justice Stone for his dissent from the majority's extension of 'privileges or immunities' in Colgate v. Harvey, 296 U. S. 404, 436, 445, which, incidentally, was later expressly overruled in Madden v. Kentucky, 309 U. S. 83, 93. A like apprehension suggests no less than, where an ordinance does not, on its face or as administered, deprive of life, liberty or property either arbitrarily, discriminatorily, or capriciously, and there has been no denial of procedural due process, the interpretation of the ordinance and the manner of its administration should, in the first instance, be left to the courts of the state.[5]

[5] Railroad Commission of Texas v. Pullman Co., 312 U. S. 496, 499-500; Thompson v. Magnolia Co., 309 U. S. 478, 484; Lindsey v. Washington, 301 U. S. 397, 400; Bevins v. Prindable, 39 F. Supp. 708, 713 (E. D.

The opinion of Justice Roberts in the Hague case cannot be said to furnish the plaintiffs any support for federal jurisdiction under the averments of their bill. The right of action under R. S. Sec. 1979, which Justice Roberts perceived under the bill in the Hague case, was for the redress of state abridgment of the complainants' privileges and immunities as citizens, contrary to the Fourteenth Amendment. What it is necessary to aver in order to plead jurisdiction of a case under the due process clause of the Fourteenth Amendment, was, therefore, neither germane nor considered. A want of due process is not a condition of the security against state abridgment which the Fourteenth Amendment gives to citizens in respect of their privileges and immunities. Moreover, even though the present plaintiffs are citizens, the redress which they seek is not for the abridgment of privileges or immunities attending their national citizenship. The rights which they assert are attributes of the liberty, incident to all persons subject to the jurisdiction of the United States regardless of their citizenship."

(R. 165, 166, 167)

Judge Maris, in his opinion on the question of jurisdiction, in which a majority of the court below concurred, quotes a paragraph from the brief of Mr. Justice Frankfurter, when he was counsel for the appellants in the case of *Adkins v. Children's Hospital*, 261 U. S. 525, 530, 531. It is cited in support of the proposition that the only thing needed to give Federal Courts jurisdiction under Section 24 (14) of the Judicial Code is an averment of want of due process of law. Counsel for the respondents respect-

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Ill.), a three judge court, where Jehovah's Witnesses assailed an Illinois statute as invalid under the Fourteenth Amendment.

fully submit that the carefully chosen language used there gives no support to such a proposition. On the contrary, it shows the need for averments of fact from which it could be deduced that the challenged state action resulted in wanton or arbitrary interference or spoliation of property. A portion of the language quoted is as follows:

> "A careful study of the long line of cases especially dealing with the 'due process' clause, beginning with the Slaughter-House Cases, 16 Wall. 36, shows two dominant ideas conceived to be fundamental principles: (1) Freedom from arbitrary or wanton interference, and (2) protection against spoliation of property. 'Arbitrary', 'wanton' and 'spoliation' are the words which are the motif of the decisions under the 'due process' clauses. That is as close as we can get to it; it is close enough when dealing with the great questions of government. What it means is that the Fourteenth Amendment intended to leave the States the free place necessary for effective dealing with the constant shift of governmental problems, and not to hamper the States except where it would be obvious to disinterested men that the action was arbitrary and wanton, and therefore spoliative and injustified."
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> (R. 158)

Never to be overlooked in this case is the important requirement that to give federal jurisdiction there must be some showing that the individuals sought to exercise their right in association with some one or more of the powers specifically granted to the Federal Government.

As counsel for the respondents read the opinion of this Court in *Hague v. C. I. O.*, *supra*, it was only because the petitioners were seeking to meet together and discuss or distribute literature bearing on the National Labor Re-

lations Act that it was held that the District Court in that case had jurisdiction. The States, no less than the Federal Government, are the protectors of individual liberties. Both State and Federal Governments are forbidden to arbitrarily intertere with individual rights.

Any case of alleged depriyation of individual rights guaranteed by the Constitution can ultimately reach this Court after having been passed on by the highest tribunals of the State authorized to determine the question involved. It is only where the claimed right is associated with the powers of the Federal Government that jurisdiction arises under Section 24 (14). For example, if these complainants, in the exercise of their right of free speech and press and worship, were attempting to transport their religious literature in interstate commerce, and the respondents, under color of some ordinance, were attempting to arbitrarily deprive them or interfere with such transportation, then a case under Section 24 (14) would be made out.

There is not only an absence of any averment of fact from which the Court would be justified in inferring a want of due process but an absence of any averment that the petitioners were exercising their claimed rights in connection with any of the powers or duties of the national government. The District Court lacked jurisdiction.

ORDINANCE NO. 60 IS A VALID EXERCISE OF THE SOVEREIGN POWER OF THE STATE TO TAX AND TO PLACE A CURB ON UNBRIDLED SOLICITATION OF PEOPLE IN THEIR HOMES AND TO PROTECT THE RESIDENTS OF THE COMMUNITY FROM FRAUD

This question is discussed at length on behalf of the respondents in the cases of *Murdock et al. v. City of Jean*

uette, at Nos. 480 to 487 October Term, 1942, and that discussion will not be repeated here.

There are, however, some things in the record in this case which emphasize the need for protection of the right of privacy, and the right of citizens to be secure in their homes, from undue and unwanted solicitation.

In the Murdock case, counsel pointed out that ordinances of the type now under consideration have long been upheld in Pennsylvania as an exercise of the police power and of the taxing power of the State. In the earlier cases, such ordinances were attacked on the ground that they were a deprivation of property and a restraint on the individual's right to pursue a lawful calling.[1] In more recent cases, it has been contended that freedom of press, of worship, and of speech was abridged.[2]

In one of the earlier cases, the Supreme Court of Pennsylvania said:

> "Our laws relating to peddling are directed, not against the right of acquisition, but the manner in which some people exercise that right; not to the right of an owner to sell his goods, but to the manner in which he may sell them. Our peddling laws are therefore not in violation of the constitutional rights of the owners of goods, but are a wise exercise of the police power over the manner in which goods, wares, and merchandise shall be sold."

Commonwealth v. Gardner, 133 Pa. 284, 290 (1890)

[1] Warren v. Geer, 117 Pa. 207, 211, 212; Commonwealth v. Gardner, 133 Pa. 284, 289, 290.

[2] See Com. v. Stewart, 137 Pa. Superior Ct. 445, 446, 9 A. 2d 179; Com. v. Pabus, 141 Pa. Superior Ct. 430, 440, 15 A. 2d 481; Com. v. Hessler, 141 Pa. Superior Ct. 421, 15 A. 2d 486; Com. v. Reid, 144 Pa. Superior Ct. 569, 575-6, 20 A. 2d 841; Pittsburgh v. Ruffner, 134 Pa. Superior Ct. 192, 4 A. 2d 224.

In one of the later cases, the Superior Court of Pennsylvania said:

> "But the very clause of the Constitution which protects him in his religious worship, protects others from having his religious tenets and beliefs thrust upon them, against their will, in their homes and offices. Furthermore, the constitutional guaranty of freedom of religious worship furnishes no ground for striking down a reasonable and salutary ordinance designed to protect people in their homes and offices from being victimized by unscrupulous and unauthorized agents. In fact, this ordinance protects duly authorized agents of the organization alleged to be sponsoring the appellant from the acts of unauthorized and unscrupulous persons who may falsely pretend to be its representatives. The constitutional right of freedom of worship does not guarantee anybody the right to sell anything from house to house or in buildings belonging to, or in the occupancy of, other persons."

City of Pittsburgh v. Ruffner, 134 Pa. Superior Ct. 192, 4 A. 2d 224, 227 (1939).

The record in this case shows that the cards signed by J. O. Rutherford and certifying that the bearer is a minister of Jehovah's Witnesses are loosely handled and may be obtained by anyone. It shows that virtually no control is exercised over the persons who solicit the homes. The several solicitors did not know the names of their superiors, and there is nothing to indicate that the superiors knew the names of the solicitors, or their addresses. In the one instance, in which a list of names was furnished, there is nothing to show that it was accurate or that it contained addresses. The alleged ministers were from many different communities of Western Pennsylvania.

Ohio and West Virginia. They may have been high-minded citizens but they may also have been evilly disposed.

The solicitation was entirely outside the realm of reason. Residents of the community were frequently called upon two, three and four times a day to hear their religions and their churches denounced as a snare and a racket.

The purpose of Jehovah's Witnesses was not that of reasonably carrying messages of religion into the homes, but to harass and annoy the residents and embarrass the city authorities, and to force a withdrawal of the cases which were then pending before the Courts for decision.

The ordinance was not attacked on the ground that the fee imposed placed an unreasonable burden or a substantial clog on the activities of Jehovah's Witnesses. It was assailed, and Jehovah's Witnesses refused to comply with it, because, they said, it was a matter of conscience. Nevertheless, there is enough in the record to demonstrate beyond any question that the fees prescribed by the ordinance would not have interfered with or operated as a substantial clog on any reasonable solicitation which the members wished to make in the City of Jeannette.

The differential between the cost and sale price of books is ample to permit the payment of such fees. In fact, the payment of license fees prescribed by the Jeannette ordinance, and in other localities, would be very substantially less than the amounts now paid out monthly by such organizations as Kingdom Service for legal services.

If the petitioners feel impelled to sell their books from door to door in the City of Jeannette, they are at perfect liberty to do so by paying the modest fee prescribed in the ordinance. The tax imposed would do nothing more than compel them to be moderate in their efforts. If they de-

cline to pay the fee, as prescribed, there are still many other methods of circulation and distribution open to them. Solicitation by mail, immediately suggests itself. The streets are available to Jehovah's Witnesses at all times for the purpose of selling their literature, and no license fee is required. People may be assembled together at a place of meeting and the salesmen can peddle their books to their hearts' content without paying anything.

As noted in the Murdock cases, the City of Jeannette maintains a public auditorium, and this, too, as a place of meeting, is available at no cost, provided some resident of the City requests its use.

There is thus no effort to hamper the religious freedom of the speech or press activities of the petitioners.

Mr. Justice Murphy, in his dissenting opinion, in the case of *Bowden et al. v. The City of Fort Smith*, 314 October Term, 1941, in which the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas concur, makes the following statement:

> "Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest which does not unduly infringe the right. However, there is no assertion here that the ordinances were regulatory, but if there were such a claim, they still should not be sustained. No abuses justifying regulation are advanced and the ordinances are not narrowly and precisely drawn to deal with actual, or even hypothetical evils, while at the same time preserving the substance of the right."

It is respectfully submitted that the decision of the Supreme Court of Pennsylvania, hereinbefore cited, showed

a recognition by that Court for many years that the method or manner of selling books and merchandise of any kind from door to door is one that is fraught with peril to the citizens, and thus a proper subject of taxation and regulation, and further that the record in this case shows the excesses to which Jehovah's Witnesses will intrude upon the right of privacy and the right of citizens to be protected in their homes unless a restraining influence in the form of a modest tax is applied.

FRED B. TRESCHER,
KUNKLE, TRESCHER & SNYDER,
Attorneys for Respondents.